In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 134

PARAGON JEWEL COAL COMPANY, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

In our Memorandum in Opposition, we stated our agreement with petitioner that the decision below was wrong and basically in conflict with *Parsons* v. *Smith*, 359 U.S. 215. We questioned, however, whether the matter was of sufficient importance to warrant resolution by this Court at the present time and concluded "on balance" that it would be appropriate for the Court "to await further developments before undertaking another review of this question." Since the filing of that memorandum, we have had occasion, in connection with proposed legislation, to re-examine the problems created by the decision below. In the course of that re-examination and a considera-

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tion of the difficulties of solving the problems legislatively, we have become persuaded that the question is of sufficient dignity to warrant this Court's attention and that a judicial reversal of the decision below would provide the only wholly satisfactory solution to the problems of administration created by it. The purpose of this supplemental memorandum is to advise the Court of the interim developments and of the reasons why we think the case worthy of review.

The decision below was adverse to the interests not only of the government but also of the many lessees (or owners) of coal lands who found themselves in positions similar to Paragon. With their right to the full depletion deduction—which was thought to have been settled by *Parsons*—being challenged anew, they were understandably unwilling to face another long round of litigation and turned to Congress for a legislative solution. A bill (H.R. 7307, 88th Cong.) which would explicitly deny depletion to contract miners under the typical kind of arrangement involved in this case[1] passed the House on June 24, 1964, and was referred to the Senate Finance Committee on June 30, 1964. On August 4, 1964, the Finance Committee announced that public hearings would be held on the bill.

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[1] The bill would deny depletion to contract miners if two factors are present, *i.e*, if the contract miner must deliver all of the mineral extracted to the lessee (or landowner) and if payment is in terms of a fixed sum per unit. See H. Rep. No. 1516, 88th Cong., 2d Sess.

The legislative activity, while emphasizing the need for a resolution of the uncertainties created by the decision below, has also placed in sharp focus the limitations on the tools available to Congress to resolve a problem of this sort. Constitutional limitations aside, retroactive legislation purporting to take a tax benefit away from one party to a past transaction and give it to another is obviously undesirable. Prospective legislation, on the other hand, may solve the question for the future—albeit at the price of adding still another highly particularized provision to an already over-burdened Code—but would not solve it for past periods and would thus fail of the purpose to end litigation of the matter.

Considering the problems presented by the legislative proposals, we have become persuaded that the question merits the attention of this Court and is one that can much better be resolved by the judicial, rather than the legislative, process. Correction of departures from established principles by lower courts is traditionally the function of this Court, and it ought not require an Act of Congress, enrolled as a part of the permanent tax code, to correct an error of a single court of appeals. Since the decision below is, in our view, contrary to the controlling precedents of this Court, review and correction here would impose a minimum burden on this Court's time. On the other hand, it is likely that a denial of certiorari would only postpone, and not avoid, the necessity of reviewing the question. Even were the government willing to acquiesce in the decision

below—as it is not—the lessees would of course not be, and they may be counted upon to bring their suits, if possible, in another forum (*e.g.*, the Court of Claims) in an effort to establish a direct conflict. In the meantime, the government, to protect the revenue, will need to take positions adverse to both parties to prevent the same deduction from being taken twice and in an attempt to keep the cases open pending a final resolution of the question. A substantial number of cases involving the issue are already pending,[2] and the effect of the decision below can only be significantly to increase the quantity of litigation. If, as seems likely, the question would ultimately reach this Court anyway, there is nothing to be lost and much to be gained by disposing of the matter now.

In sum, with the considerations for and against review already closely in balance, the Congressional concern that has been generated by it seems to us to add sufficient stature to this case to warrant its review by this Court. For that reason, and because of the extensive litigation that is threatened to be precipitated by the decision below, we now join with peti-

[2] The Internal Revenue Service indicates that their records show six cases docketed in the Tax Court and four cases docketed in district courts (some involving several taxpayers) which deal with the issue here. In addition, *Dotson* v. *United States*, No. 23–62, pends in the Court of Claims and *Lawson* v. *Commissioner*, decided June 27, 1963, is on appeal from the Tax Court to the Fourth Circuit. Both raise the question here.

tioner in urging that the petition for certiorari be granted.

Respectfully submitted.

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